Supreme Court, U.S.
FILED

No. 01391 MAR - 6 2001

OFFICE OF THE CLERK

In The

Supreme Court of the United States

ANTHONY SANTORELLI,

Petitioner,

v.

JAMES R. COWHEY, Justice of the New York Supreme Court, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

DIARMUID WHITE
Counsel of Record
BRENDAN WHITE
148 East 78th Street
New York, NY 10021
(212) 861-9850

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether, in violation of the constitutional rule of *Cage v. Louisiana*, 498 U.S. 39 (1990), that a jury charge on reasonable doubt may not suggest a higher degree of doubt than is required for acquittal, Petitioner was denied due process when the trial court charged the jury that a reasonable doubt "goes a good deal further" than a fleeting or minimal type and is "a good deal more" than a mere possibility?

2. Whether Petitioner's federal claim was "adjudicated on the merits" within the meaning of 28 U.S.C. § 2254(d), and thus the deferential "unreasonable application" standard of review was properly applied rather than the pre-AEDPA *de novo* standard, where the state courts neither discussed nor cited controlling Supreme Court case law, nor state court decisions which refer to appropriate federal law?

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding in the court whose judgment is sought to be reviewed were Petitioner Anthony Santorelli and Respondents James R. Cowhey, Justice of the New York Supreme Court, Rocco A. Pozzi, Commissioner, Department of Corrections, Westchester County, New York, and Eliot L. Spitzer, Attorney General, New York.

TABLE OF CONTENTS

Page

Questions Presented i

Parties to The Proceeding Below ii

Table of Authorities iv

Opinions Below 1

Jurisdiction 1

Constitutional and Statutory Provisions Involved ... 1

Statement of the Case 2

Reasons for Granting the Petition 10

Conclusion 23

Appendix

Summary Order of the United States Court of Appeals for the Second Circuit .....App. 1

Opinion of the United States District Court for the Southern District of New York.....App. 4

Opinion of the New York Court of Appeals....App. 18

Opinion of the New York Supreme Court, Appellate Division, First Department .....App. 33

Jury Instruction of the New York Supreme Court, Westchester County, on Reasonable Doubt, and Exception thereto.....App. 35

TABLE OF AUTHORITIES

Page

CASES

Bacon v. Lee, 225 F.3d 470 (4th Cir. 2000) 21

Beverly v. Walker, 118 F.3d 900 (2d Cir. 1997) 11

Cage v. Louisiana, 498 U.S. 39 (1990) ..... *passim*

Chalmers v. Mitchell, 73 F.3d 1262 (2d Cir. 1996) ..11, 19

Cupp v. Naughten, 414 U.S. 141 (1973) 18

Estelle v. McGuire, 502 U.S. 62 (1991) 16, 18

Gaines v. Kelly, 202 F.3d 598 (2d Cir. 2000) 12

Hameen v. Delaware, 212 F.3d 226 (3d Cir. 2000)..... 21

Humphrey v. Cain, 120 F.3d 526 (5th Cir. 1997)..... 11

Humphrey v. Cain, 138 F.3d 552 (5th Cir. 1998)..... 11

Mercadel v. Cain, 179 F.3d 271 (5th Cir. 1999) 21

People v. Messiah, 247 A.D.2d 490, 668 N.Y.S.2d 94 (2d Dept. 1998).....7, 21

People v. Robinson, 218 A.D.2d 673, 630 N.Y.S.2d 505 (2d Dept. 1995).....21, 22

Sawyer v. Smith, 497 U.S. 227 (1990)..... 20

Sullivan v. Louisiana, 508 U.S. 275 (1993).....10, 18

Teague v. Lane, 489 U.S. 288 (1989) 20

Tyler v. Cain, 1998 WL 614183 (E.D.La. Sep. 10, 1998), *aff'd.*, No. 098-31159 (5th Cir. Jun. 1, 2000) (unpublished), *cert. granted* (U.S. Dec. 11, 2000).....10, 19, 20

Vargas v. Keane, 86 F.3d 1273 (2d Cir. 1996).....11, 18

TABLE OF AUTHORITIES – Continued

Page

Victor v. Nebraska, 511 U.S. 1 (1994) 11, 12, 13, 14, 15, 17

Washington v. Schriver, 2001 U.S. App. LEXIS 129 (2d Cir. Jan. 5, 2001) 21

Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1495 (2000) 7, 20, 22

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2254(d) 7, 8, 9, 20

MISCELLANEOUS

The American Heritage Dictionary of the English Language (3d Ed.) 14

PETITION FOR A WRIT OF CERTIORARI

Petitioner prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is contained in a Summary Order, which is unreported and is reprinted in the appendix at App. 1. The opinion of the district court, reported at 124 F.Supp.2d 853, is reprinted at App. 4. The opinion of the New York Court of Appeals, reported at 95 N.Y.2d 412, 718 N.Y.S.2d 696, is reprinted at App. 18. The opinion of the New York Supreme Court, Appellate Division, reported at 267 A.D.2d 259, 699 N.Y.S.2d 290, is reprinted at App. 33.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 2001. This petition for a writ of certiorari is filed within ninety days of that judgment in compliance with Rule 13. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V, provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

United States Constitution, Amendment XIV, provides in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

Title 28, United States Code, Section 2254, provides in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. . . .

STATEMENT OF THE CASE

1. Petitioner was tried before a jury in 1998 in Supreme Court, Westchester County, New York, on four counts of tampering with physical evidence. It was alleged that Petitioner knowingly tampered with evidence by placing in garbage containers in the parking lot of a fast-food restaurant two trash bags containing blood-stained clothing. The prosecution theorized that the clothing had been worn by two young men involved in a

homicide during an altercation outside a Yonkers bar several hours earlier and had been given to Petitioner by his son for disposal. An FBI agent, fortuitously having lunch at the fast-food restaurant, witnessed Petitioner disposing of the bags, retrieved them, and later ascertained that Petitioner's fingerprints were on them. At trial, the defense maintained that Petitioner did not know the source of the bags' contents.

2. The trial court's jury charge on reasonable doubt was as follows:

> I am now going to discuss with you and define for you the term "proof beyond a reasonable doubt." You people as the triers of the fact in this matter do not have to be absolutely positive that the defendant is guilty. You do not have to believe that he is guilty to such a degree that there can be no possibility of doubt about it. The law does not require that because nothing in this life is so absolutely certain that it can be proven that completely; but you do, if you're going to convict the defendant after being satisfied of his guilt in a way that leaves you without any reasonable doubt of it. Those words "reasonable doubt" means nothing more or less than the two words themselves mean.
>
> You know perfectly well what is doubt. It's something that makes you unsure or uncertain. *If your doubt is simply of the fleeting or minimal type,* it's not a basis for avoiding the conclusion or for avoiding the determination of the facts in this matter. *A reasonable doubt goes a good deal*

further. A reasonable doubt is an uncertainty[1] for which you have what appears *important* to be a reason based upon the evidence in the case or lack of evidence in the case. *It refers to a good deal more than a mere possibility.* If *such* reasonable doubt remains after all of the proof has been given, then the People have not established guilt under our law. If you do not have a reason – something that a reasonable person would recognize as making sense for that doubt, you should disregard that doubt if you have been otherwise convinced of guilt. But if you have a reasonable doubt, one based upon the testimony in this case, one that seems to make sense, not just some kind of mere whim or impulsive idea or some kind of emotional gut reaction, because that would not be a reasonable doubt; or if you have a reason based upon the lack of evidence in the case, on one of the essential elements of the crime charged and thereby they are being considered by you, then you have come up with a a [*sic*] reasoning for voting not guilty.

Now in order to understand this term "proof beyond a reasonable doubt," I am going to approach its definition both from the positive as well as from the negative point of view.

---

[1] The district court's opinion, setting forth an excerpt of the trial court's reasonable doubt instruction and repeating a typographical error in Petitioner's habeas corpus petition, reports this clause as stating, "A reasonable doubt is *a doubt*," rather than, "A reasonable doubt is *an uncertainty*." (App. 6.) This error was brought to the attention of the court of appeals by Petitioner at oral argument of his appeal. The trial court's charge on reasonable doubt is fully and accurately set forth in the Appendix at App. 35-38.

Firstly from the negative point of view I will tell you what the term is not. The term does not refer to just any kind of a doubt, such as a mere whim, a guess, a surmise or even a feeling that the accused may not be guilty. Again, the human mind can conceive of doubt on virtually any topic. It is not a requirement of proof beyond all doubt. It is not a requirement of proof to some kind of mathematical or scientific certainty. On the other hand, it's not proof that the defendant is guilty by a mere preponderance of the weight of credible evidence.

As some of you people have sat in a civil case will recall the rule to be applied in a civil case is proof of the defendant's guilt be [sic] a mere preponderance of the weight of the credible evidence is not sufficient to prove the defendant guilty in this or any other criminal case; and, of course, the rule is not one that is to be used by any juror as an excuse or a mechanism to avoiding from performing what he or she might consider to be a difficult or disagreeable duty.

Now having indicated to you what that term is not, we shall now approach the definition from the positive point of view. And I will tell you what reasonable doubt is. A reasonable doubt is a doubt which you conscientiously have at the use of your power of reasoning which arising out of the credible evidence or lack of credible evidence. It is a doubt for which you have a reason. And when you're convinced that you have no doubt in reason of the defendant's guilt then that is sufficient and you must render a verdict any [*sic*] accordingly. (App. 35-37; emphasis added.)

At the conclusion of the court's jury charge, but prior to deliberations, Petitioner's counsel raised the following objection:

> [COUNSEL]: Your honor, I except to the portion of your reasonable doubt charge in which on two occasions you used the phase [*sic*] "a good deal further." You said what a reasonable doubt is not, "to go a good deal further than beyond a possibility." Yes, your honor, we except to the use of this terminology "a good deal further." You used it once prior to that, a good deal more than a mere possibility, it goes a good deal further. I don't know what the terminology was, your Honor. We, think it did loosely – [*sic*][2]
>
> THE COURT: I think it states it. This charge on reasonable doubt has passed muster of the court of appeals on many occasions.
>
> [DEFENSE COUNSEL]: I'm wondering if anyone has raised this one before, your Honor. We except to that in any event. (App. 38.)

3. On March 9, 1998, the jury found Petitioner guilty as charged, and on June 1, 1998, Petitioner was sentenced to four concurrent indeterminate sentences of one and a-third to four years' imprisonment.

4. Among the claims raised on Petitioner's ensuing appeal of his conviction to the New York Supreme Court, Appellate Division, was that "The Defendant Was Denied Due Process When The Trial Court, In Emphasizing What A Reasonable Doubt Is Not, Charged The Jury That A

---

[2] Petitioner submits that "did loosely" was a transcription error for "dilutes."

Reasonable Doubt 'Goes A Good Deal Further' Than A Fleeting Or Minimal Type And Is 'A Good Deal More' Than A Mere Possibility, To Which The Defendant Duly Excepted," citing *Cage v. Louisiana*, 498 U.S. 39 (1990). (Brief of Defendant-Appellant in Appellate Division, Point IV.) Petitioner raised the identical claim in his appeal to the New York Court of Appeals. (Brief of Defendant-Appellant in Court of Appeals, Point III.)

Petitioner's conviction was affirmed by the New York Supreme Court, Appellate Division, on November 8, 1999, and by the New York Court of Appeals on October 26, 2000. The Appellate Division's opinion rejected his challenge to the reasonable doubt charge in one sentence, citing another of its cases in which an unspecified challenge to the same trial judge's reasonable doubt charge was upheld: "Contrary to the defendant's contention, the reasonable doubt charge was proper (see, People v. Messiah, 247 AD2d 490)." (App. 34.) The Court of Appeals' opinion disposed of Petitioner's challenge to the reasonable doubt charge in the omnibus statement that "[d]efendant's remaining contentions, to the extent preserved, are without merit." (App. 31.)

5. On October 31, 2000, Petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of New York. Petitioner's single claim was that the New York courts' rejection of his challenge to the reasonable doubt charge involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States, *see* 28 U.S.C. § 2254(d); *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 1519 (2000), because an instruction that a reasonable doubt "goes a good deal further" than a

fleeting or minimal type and is "a good deal more" than a mere possibility "suggest[s] a higher degree of doubt than is required for acquittal under the reasonable-doubt standard," *citing Cage v. Louisiana*.

On December 8, 2000, the petition was denied and dismissed in a memorandum order and decision. (App. 4-17.) The district court, after determining that Petitioner's claim was exhausted and preserved, rejected the claim on its merits. The court concluded that both of the challenged "phrases were articulated as comparative terms, to be compared with capricious or unreasonable doubt" and, therefore, "those phrases did not limit the definitional parameters of reasonable doubt as they did in *Cage*, nor did they define a higher quantum or degree of doubt than what is permitted under the Due Process Clause." (App. 15.) The court was also of the view that the challenged phrases could not be analogized to the terms used in *Cage* – "moral certainty," "grave uncertainty," and "actual substantial doubt" – and therefore the charge at issue neither misapplied the holding in *Cage* nor unreasonably refused to extend it to Petitioner's case. (App. 15.) Finally, the court concluded that the trial court's reasonable doubt charge, viewed as a whole, was not reasonably likely to instruct the jury to apply the reasonable doubt standard in a way that violated the constitution. (App. 15-16.) The court granted a certificate of appealability.

6. Petitioner appealed to the United States Court of Appeals for the Second Circuit. In that court, in addition to arguing the merits of his claim, he argued for the first time that his federal claim had not been "adjudicated on the merits" within the meaning of 28 U.S.C. § 2254(d),

because the state courts neither cited nor applied federal law, nor relied upon precedents which in turn cited or applied federal law with respect to Petitioner's federal claim. Thus, he argued, the deferential "unreasonable application" standard of review of § 2254(d) does not apply, and the claim should be reviewed under the standard employed prior to enactment of § 2254(d). Specifically, since Petitioner's sole claim raised a question of law, the appropriate standard is *de novo* review, that is, the federal court exercises "independent judgment" on the question.

On February 20, 2001, the court of appeals affirmed the judgment of the district court in a summary order, "substantially for the reasons stated" by the district court. (App. 2.) The court of appeals added only that "[a]lthough it would have been far preferable for the trial court to give a standard reasonable-doubt instruction, we cannot conclude that the charge given, viewed as a whole, would have misled the jury to return a verdict of guilt on less than the required quantum of proof." (App. 2.)

REASONS FOR GRANTING THE PETITION

I

Stinting Interpretation of The Constitutional Rule of *Cage v. Louisiana* – That A Jury Charge on Reasonable Doubt May Not Suggest A Higher Degree of Doubt Than Is Required for Acquittal – Has Rendered It Ineffectual, Even Though It Is A Watershed Rule Implicit in The Concept of Ordered Liberty.

1. In the more than ten years since *Cage v. Louisiana*, 498 U.S. 39, was decided, only rarely has a jury charge been found to violate its rule that a reasonable doubt instruction may not "suggest a higher degree of doubt than is required for acquittal under the reasonable-doubt standard," *id.* at 41, and rarer still are any such cases that do not arise out of Louisiana trials in which language identical or nearly identical to that in *Cage* itself was used. Indeed, even such Louisiana cases may now have fallen beyond the pale of *Cage*. *See Tyler v. Cain, cert. granted* (U.S. Dec. 11, 2000) (No. 00-5961) (presenting question whether *Cage* announced retroactive "new rule" so as to permit collateral review of jury charge at Louisiana trial).

The dearth of such cases is disturbing since in *Sullivan v. Louisiana*, 508 U.S. 275 (1993), the Court held that the charge found unconstitutional in *Cage* is not subject to harmless error analysis, because denying the right to a jury verdict beyond a reasonable doubt is a structural defect which takes away a basic protection "whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function." *Id.* at 281. Accordingly, it has been said that the *Cage* rule is

"implicit in the concept of ordered liberty." *Humphrey v. Cain*, 120 F.3d 526, 529 (5th Cir. 1997) (citations omitted), *adopted on rehearing*, 138 F.3d 552, 553 (1998) (en banc).

The reason so few cases have found violations of *Cage* may not be that trial courts have hearkened to the Court's call so much as that appellate courts have rendered *Cage* academic by almost inevitably finding that the challenged instructions are in conformity with *Victor v. Nebraska*, 511 U.S. 1 (1994), which upheld problematic reasonable doubt language determined to have been used in the sense of the existence rather than the magnitude of the doubt. *See, e.g., Beverly v. Walker*, 118 F.3d 900, 904 (2d Cir. 1997) ("It is not reasonably likely that the jury understood these words [– 'some good sound substantial reason' –] to describe the quantity of doubt necessary for acquittal, rather than as a contrast to doubt based on impermissible criteria such as conjecture or speculation"); *Vargas v. Keane*, 86 F.3d 1273, 1278 (2d Cir. 1996) (characterization of reasonable doubt as "one for which you can give a reason if called upon to do so by a fellow juror . . . serves to emphasize, in conjunction with surrounding language, that any doubt sufficient for acquittal must be based on a reasoned evaluation of the evidence, rather than on speculation, emotion or whim"); *Chalmers v. Mitchell*, 73 F.3d 1262, 1268 (2d Cir. 1996) ("a doubt for which some good reason can be given" means a doubt "based on the existence or non-existence of evidence, as opposed to based on conjecture or imagination").[3]

---

[3] This trio of Second Circuit cases has frequently been cited by other courts upholding an instruction challenged under *Cage*. *See Humphrey v. Cain*, 120 F.3d at 556-57 (dissent); *Tyler v.*

Notably, in the one habeas corpus case where the Second Circuit, citing *Cage* and other cases, held that a state trial court's reasonable doubt charge – which gave seven different definitions of reasonable doubt – was unconstitutional, the state appellate courts had reversed "no fewer than 21 convictions" because of the same reasonable doubt charge by the same judge. *Gaines v. Kelly*, 202 F.3d 598, 606 (2d Cir. 2000). Even then, the Second Circuit concluded only that the charge contained numerous deficiencies which "may withstand constitutional scrutiny in isolation," but not cumulatively. *Id.*

Any assessment of the extent to which *Cage* error is brushed aside is made impossible by the fact that appellate decisions, particularly by state courts, often engage in no analysis of the claim at all. For example, here, as will be developed more fully in the second point of this petition, the Appellate Division rejected Petitioner's claim in one sentence, stating that "[c]ontrary to the defendant's contention, the reasonable doubt charge was proper" and citing one of its own decisions with no pertinence to the *Cage* claim at all. (App. 34.) And the New York Court of Appeals' opinion disposed of the claim in the statement that "[d]efendant's remaining contentions, to the extent preserved, are without merit." (App. 31.) But even where a *Cage* claim is addressed, the conceptual distinction between *Victor* and *Cage* has not always been observed or has been distorted, as in the instant case.

Cain, 1998 WL 614183 at * 3 (E.D.La. Sep. 10, 1998), *aff'd.*, No. 098-31159 (5th Cir. Jun. 1, 2000) (unpublished), *cert. granted* (U.S. Dec. 11, 2000) (No. 00-5961).

In *Cage*, the Court held that the Due Process Clause was violated by a charge that equated a reasonable doubt with a "grave uncertainty" and an "actual substantial doubt." The Court concluded that "the words 'substantial' and 'grave' as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable-doubt standard." 498 U.S. at 41. The Court added that a reasonable juror could have interpreted the instruction in *Cage* to allow a finding of guilt based on a degree below that required by the Due Process Clause, considering that the charge stated that what is required for a finding of guilt is "not an absolute or mathematical certainty, but a moral certainty." *Id.* at 40-41.

In *Victor*, the Court drew a constitutional distinction between terms in a reasonable doubt charge that go to the existence of the doubt and those that go to the magnitude of the doubt. The challenged portion of the pertinent reasonable doubt instruction in *Victor* was as follows:

> A reasonable doubt is an actual and substantial doubt reasonably arising from the evidence, from the facts or circumstances shown by the evidence, or from the lack of evidence on the part of the State, as distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful conjecture.

511 U.S. at 18. Victor argued that equating a reasonable doubt with a "substantial doubt" overstated the degree of doubt necessary for acquittal. *Id.* at 19.

The *Victor* Court agreed that the construction was somewhat problematic, because, while "substantial" can mean "not seeming or imaginary," it can also mean "that

specified to a large degree," the latter of which definitions "could imply a doubt greater than required for acquittal under [*In re*] *Winship*[, 397 U.S. 358 (1970)]." *Victor*, 511 U.S. at 19-20. The Court noted that in *Cage* it "did not hold that the reference to substantial doubt alone was sufficient to render the instruction unconstitutional," but rather it was "concerned that the jury would interpret the term 'substantial doubt' in parallel with the preceding reference to 'grave uncertainty,' leading to an overstatement of the doubt necessary to acquit." *Id.* at 20. The Court then concluded:

> In the instruction given in Victor's case, the context makes clear that "substantial" is used in the sense of *existence rather than magnitude* of the doubt, so the same concern [as in *Cage*] is not present.

Id. (emphasis added).

2. Here, the plain language of trial court's "good deal more" formulation and, perhaps even more so, the plain language of the court's instruction that a reasonable doubt "goes a good deal further" than a "fleeting or *minimal* type," clearly describe the magnitude of the doubt required for acquittal, not simply its existence. The word "deal" itself refers to "an indefinite quantity, extent or degree." The American Heritage Dictionary of the English Language, 3d ed., at 479. As modified by the adjective "good," meaning "ample, substantial," *id.* at 780, the trial court's formulation denoted a large, indefinite quantity. Thus, the "good deal more"/"good deal further" formulation, *by definition*, goes to the magnitude of the doubt.

Yet the district court, shoe-horning Petitioner's *Cage* claim into the mold of *Victor*, concluded that both challenged phrases were "articulated as comparative terms, to be compared with capricious or unreasonable doubt" and, therefore, "those phrases did not limit the definitional parameters of reasonable doubt as they did in *Cage*, nor did they define a higher quantum or degree of doubt than what is permitted under the Due Process Clause." (App. 15.) And the court of appeals affirmed "substantially for the reasons stated" by the district court. (App. 2.)

Conceptualizing the phrases as "comparative phrases, to be compared with capricious or unreasonable doubt," converts them into phrases going to the existence rather than the magnitude of the doubt, and therefore acceptable under *Victor*, but such conversion is forced. It is unreasonable to view the following as not addressing, or not comparing, the *magnitude* of the doubt:

> If your doubt is simply of the fleeting or *minimal* type, it's not a basis for avoiding the conclusion or for avoiding the determination of the facts of this matter. A reasonable doubt goes *a good deal further*. (App. 35; emphasis added.)

It should be borne in mind in this regard that the challenged phrases must not be viewed abstractly – as the courts' analysis below does – but "as they are commonly understood." *Cage*, 498 U.S. at 41. Similarly, the ensuing instruction that reasonable doubt refers to "a *good deal more than* a mere possibility," as commonly understood, would strike the average juror as addressing the magnitude of the doubt, not merely as comparing a reasonable

doubt to a caprice or unreasonable doubt, and its context does not alter such a common understanding:

> A reasonable doubt is an uncertainty for which you have what appears *important* to be a reason based on the evidence in the case. It refers to *a good deal more* than a mere possibility. (App. 35; emphasis added.)

There is no need – and no proper purpose – to employ comparatives if a court simply charges the jury that a reasonable doubt "*is* not" a mere possible doubt, a caprice or a whim. Comparatives – at least of the "good deal further"/"good deal more" type – inevitably connote quantification. The trial court's use of the terms invited jurors to so understand them.

The challenged phrases, "as they are commonly understood," *Cage*, would likely be applied by a jury "in a way that violates the constitution." *Estelle v. McGuire*, 502 U.S. 62, 72 (1991). It is reasonably likely that 12 jurors sitting in the box – as they heard the trial judge instruct them that a reasonable doubt "goes a good deal further" than a fleeting or minimal doubt and is "a good deal more than a mere possibility" – would understand those instructions, and later apply them, in an unconstitutional way, *Estelle*, namely, as "suggest[ing] a higher degree of doubt than is required for acquittal under the reasonable-doubt standard." *Cage*, 498 U.S. at 41.

3. The decisions of the courts below are also emblematic of the evisceration of *Cage* caused by holding the challenged language up to the precise terms used in *Cage*. The district court concluded that "nothing in [the trial court's] charge can be analogized to the term 'moral

certainty,' which was the phrase in *Cage* that – in combination with 'grave uncertainty' and 'actual substantial doubt' – made it reasonably likely that a juror could have applied 'reasonable doubt' in a way that violated the Constitution." (App. 15) But a jury charge that suggests a higher degree of doubt than is required for acquittal is unconstitutional, the precise terms notwithstanding.

In *Cage*, the portion of the court's charge at issue was the following:

> [A reasonable doubt] must be such doubt as would give rise to a grave uncertainty, raised in your mind by the reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. It is an actual substantial doubt. It is a doubt that a serious man can entertain. What is required is not an absolute or mathematical certainty, but a moral certainty.

Id. at 40. The Court found this unconstitutional because:

> It is plain to us that the words "substantial" and "grave," as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable-doubt standard. When those statements are then considered with reference to "moral certainty," rather than evidentiary certainty, it becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilty based on a degree of proof below that required by the Due Process Clause.

Id. at 41. Notably, in *Victor* the Court analyzed its holding in *Cage* thusly:

> We did say in that case that "the words 'substantial' and 'grave' as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard." But we did not hold that the reference to substantial doubt alone was sufficient to render the instruction unconstitutional. Rather, we were concerned that the jury would interpret the term "substantial doubt" in parallel with the preceding reference to "grave uncertainty," leading to an overstatement of the doubt necessary to acquit.

511 U.S. at 20. The Court did not even refer to the "moral certainty" phrase in *Cage*. Thus, the particular terms employed in *Cage* are not of importance, but only the principle of *Cage* that the terms used may not suggest a higher degree of doubt than is required for acquittal.

4. Finally, claims of *Cage* error have been rejected on the basis that problematic language in a reasonable doubt instruction may be redeemed by the balance of the charge, since "the instruction 'may not be judged in artificial isolation,' but must be considered in the context of the instruction as a whole and the trial record."[4] *Estelle v. McGuire*, 502 U.S. at 72, *citing Cupp v. Naughten*, 414 U.S. 141, 147 (1973); *see also Vargas v. Keane*, 86 F.3d at 1276 ("an asserted error in a reasonable doubt instruction may be innocuous or inconsequential when viewed in the

---

[4] Since an unconstitutional charge on reasonable doubt is structural error, *Sullivan v. Louisiana*, 508 U.S. 275, *Estelle's* reference to "the trial record" most likely has applicability to instructions, unlike a reasonable doubt instruction, involving evidentiary issues. *Estelle* itself dealt with an instruction on prior injury evidence.

context of the charge as a whole"); *Chalmers v. Mitchell*, 73 F.3d at 1267 ("Sometimes, erroneous portions of the jury instructions are offset when considered in the context or explained by the trial court in later sections of the instructions"). And so the district court and court of appeals concluded here. (App. 2, 15-16.)

But the well-established principle of viewing the instruction as a whole raises unique problems where the challenged language refers to the magnitude of the doubt rather than its existence. Once a judge, by employing quantitative language, such as "a good deal further" or a "good deal more," has increased the degree of doubt required for acquittal, it may well be that he or she may *never* be able to redeem that constitutional fault by means of the balance of the charge, save for other *quantitative* language negativing or neutralizing it, if such is possible.

Here, for example, the portions of the balance of the charge which the district court found redemptive addressed only the possible *sources* of reasonable doubt (the evidence and testimony) and the *existence or substance* of reasonable doubt (one making sense; not mere whim, guess, surmise, or feeling; one using the power of reasoning). Such instructions have nothing at all to do with the magnitude of the doubt and thus cannot "offset" an instruction which increases the degree of doubt required for acquittal.

5. The Court granted certiorari in *Tyler v. Cain*, No. 00-5961, to decide whether *Cage* announced a retroactive "new rule" permitting collateral review of a jury charge claimed to have violated that rule. In deciding *Tyler*, the Court will presumably revisit *Cage* to determine whether

its rule "requires the observance of 'those procedures that . . . are "implicit in the concept of ordered liberty," ' " *Teague v. Lane*, 489 U.S. 288, 307 (1989) (citations omitted), that is, a "new 'watershed rule[ ] of criminal procedure' that [is] necessary to the fundamental fairness of the criminal proceeding." *Sawyer v. Smith*, 497 U.S. 227, 241-42 (1990) (citation omitted). Certiorari should be granted in this case to ensure that, assuming the questions in *Tyler* are answered in the affirmative, *Cage* will be recognized as a watershed rule that must be applied faithfully, not ignored or explained away.

II

The Reference in 28 U.S.C. § 2254(d) to Any Claim That Was "Adjudicated on The Merits" in State Court Proceedings Must Be Construed to Exclude Adjudications Which Neither Cite Nor Apply Federal Law, Nor Rely upon Precedents Which Cite Or Apply Federal Law.

The district court, applying the deferential standard of 28 U.S.C. § 2254(d), concluded that the state court decisions rejecting Petitioner's claim that the reasonable doubt charge violated *Cage v. Louisiana* did not involve an unreasonable application of clearly established Federal law. (App. 10-15.) *See Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495. Section 2254(d) provides that such deferential review is appropriate with respect to any claim that was "adjudicated on the merits" in the state court proceedings.

This Court has not construed the phrase "adjudicated on the merits," and there is a split in the circuits on its meaning. *Compare Washington v. Schriver*, 2001 U.S.App. LEXIS 129 at * 23-24 (2d Cir. Jan. 5, 2001) (federal claim has been "adjudicated on the merits" only when state courts either discuss or at least cite controlling Supreme Court case law or state court decisions which refer to appropriate federal law); *Hameen v. Delaware*, 212 F.3d 226, 248 (3d Cir. 2000), *petition for cert. filed* (U.S. Nov. 13, 2000) (No. 00-7011) (where state court did not take into account controlling Supreme Court decisions, claim not "adjudicated on the merits"); *with Bacon v. Lee*, 225 F.3d 470, 478 (4th Cir. 2000) (even where state court summarily rejects claim without articulating reasons, its order nevertheless constitutes adjudication on the merits); *Mercadel v. Cain*, 179 F.3d 271, 274 (5th Cir. 1999)(substantive rather than procedural denial of claim constitutes adjudication on the merits).

Here, the opinion of neither the Appellate Division nor the New York Court of Appeals discussed or cited controlling Supreme Court case law or state court decisions which refer to appropriate federal law. The Appellate Division's one-sentence rejection of Petitioner's claim – "Contrary to the defendant's contention, the reasonable doubt charge was proper" – cited only *People v. Messiah*, 247 A.D.2d 490, 668 N.Y.S.2d 94 (2d Dept. 1998), in which the court rejected an unspecified challenge to the reasonable doubt charge by the same trial judge, again in one sentence – "The trial court's reasonable doubt charge was proper" – citing only *People v. Robinson*, 218 A.D.2d 673, 630 N.Y.S.2d 505 (2d Dept. 1995), which in turn also upheld a reasonable doubt charge by the same trial judge,

citing only state cases as authority. Moreover, in *Robinson*, unlike the *Cage* claim here, the claim was that the instruction shifted the burden of proof. *People v. Robinson*, 218 A.D.2d at 673-74, 630 N.Y.S.2d at 506-07. And the New York Court of Appeals did not discuss the merits of Petitioner's claim at all.

Consequently, since the state courts neither cited nor applied federal law, nor relied upon precedents which in turn cited or applied federal law with respect to Petitioner's federal claim, and in fact relied upon state precedents addressing *different* claims, this Court should grant certiorari, resolve the split in the circuits, and hold that Petitioner's federal claim has not been "adjudicated on the merits" within the meaning of § 2254(d). The case should ultimately be remanded to the district court to assess Petitioner's claim under a non-deferential *de novo* standard of review. *See Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. at 1516.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
March 5, 2001

Respectfully submitted,

DIARMUID WHITE
Counsel of Record
BRENDAN WHITE
148 East 78th Street
New York, NY 10021
(212) 861-9850

Attorneys for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES–JUDICIATA.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the twentieth day of February two thousand one.

Present:

HONORABLE ELLSWORTH A. VAN GRAAFEILAND,

HONORABLE AMALYA L. KEARSE,

HONORABLE PIERRE N. LEVAL,

Circuit Judges.

ANTHONY SANTORELLI,

Petitioner-Appellant,

- v.- No. 00-2734

JAMES R. COWHEY, Justice of the New York Supreme Court; A. ROCCO, Supervising P.O.,

Commissioner, Department of Corrections, Westchester County, NY; ELIOT L. SPITZER, Atty General, New York,

Resondents-Appellees.

Appearing for Appellant:
Diarmuid White, N.Y., N.Y.

Appearing for Appellees:
Valerie A. Livingston,
Ass't Dist. Att'y,
White Plains, N.Y.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed substantially for the reasons stated in Judge Parker's Memorandum Decision and Order dated December 8, 2000. Although it would have been far preferable for the trial court to give a standard reasonable-doubt instruction, we cannot conclude that the charge given, viewed as a whole, would have misled the jury to return a verdict of guilt on less than the required quantum of proof.

We have considered all of petitioner's contentions on this appeal and have found them to be without merit. The judgment of the district court is affirmed.

FOR THE COURT:
ROSEANN B. MacKECHNIE, Clerk
by:

/s/ Lucille Carr

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANTHONY SANTORELLI, Petitioner, -against- JAMES R. COWHEY, Justice of the Supreme Court of the State of New York, ROCCO A. POZZI, Commissioner, Department of Corrections, Westchester County, New York, and ELIOT L. SPITZER, Attorney General, New York, Respondents.	00 Civ. 8292 (BDP) MEMORANDUM DECISION AND ORDER

BARRINGTON D. PARKER, JR., U.S.D.J.

Anthony Santorelli filed this Petition for a writ of habeas corpus challenging his 1998 conviction on charges of tampering with physical evidence. For the reasons set forth below, the Petition is denied.

BACKGROUND

Petitioner was tried in Supreme Court, Westchester County on four counts of tampering with physical evidence, namely, the bloody clothing worn by the killers of Louis Balancio – a knifing victim – on February 4, 1994. An FBI agent witnessed the Petitioner disposing of bloody clothes in two plastic trash bags behind a fast food restaurant in the Bronx hours after Balancio was

murdered. The results of tests conducted in the FBI laboratory revealed that petitioner's fingerprints were found both on the inside and the outside of one of the bags. Tests further confirmed that the blood on the clothing was that of Balancio.

On March 19, 1998, Petitioner was found guilty on all four counts, and was sentenced to a term of imprisonment of 1 and 1/3 to 4 years. The judgment of conviction was stayed pending appeal by order of the New York Appellate Division upon $350,000 bail. The Appellate Division affirmed the conviction on December 6, 1999, and the New York Court of Appeals followed by affirming on October 26, 2000. Petitioner was ordered to surrender on November 1, 2000.

Petitioner filed an emergency petition in federal court for a stay of his sentence pending a determination of his federal habeas claim. Following a hearing before Part I Judge Lewis Kaplan on October 31, 2000, Petitioner was granted a temporary stay from the execution of judgment pending a further hearing on his stay application. The application was granted by this Court on November 15, 2000, staying the execution of his sentence pending an expedited determination of this habeas Petition on the merits.

Mr. Santorelli sets forth a single exhausted claim as the basis of his habeas Petition – namely, that the state trial judge, Justice James Cowhey, incorrectly instructed the jury on the meaning of "reasonable doubt," depriving him of his federal constitutional rights to due process. In his charge, Justice Cowhey instructed the jury, in relevant part, that:

You do not have to believe that he is guilty to such a degree that there can be no possibility of doubt about it. The law does not require that because nothing in this life is so absolutely certain that it can be proven that completely; but you do [sic], if you're going to convict the defendant after being satisfied of his guilt in a way that leaves you without any reasonable doubt of it. Those words "reasonable doubt" means nothing more or less than the two words themselves mean.

You know perfectly well what is doubt. It's something that makes you unsure or uncertain. If your doubt is simply of the fleeting or minimal type, it's not a basis for avoiding the conclusion or for avoiding the determination of the facts in this matter. *A reasonable doubt goes a good deal further.* A reasonable doubt is a doubt for which you have what appears important to be a reason based upon the evidence in the case or lack of evidence in the case. *It refers to a good deal more than a mere possibility.* If such reasonable doubt remains after all of the proof has been given, then the People have not established guilt under our law. If you do not have a reason – something that a reasonable person would recognize as making sense for that doubt – you should disregard that doubt if you have [sic] otherwise convinced of guilt. But if you have a reasonable doubt, one based upon the testimony in this case, one that seems to make sense, not just some kind of mere whim or impulsive idea or some kind of emotional gut reaction, because that would not be a reasonable doubt, or if you have a reason based upon the lack of evidence in the case, on one of the essential elements of the crime charged and thereby they are being

considered by you [sic], then you have come up with a reasoning for voting not guilty.

Now in order to understand this term "proof beyond a reasonable doubt," I am going to approach its definition both from the positive as well as from the negative point of view.

Firstly, from the negative point of view, I will tell you what the term is not. The term does not refer to just any kind of a doubt, such as a mere whim, a guess, a surmise or even a feeling that the accused may not be guilty. . . . It is not a requirement of proof beyond all doubt. It is not a requirement of proof to some kind of mathematical or scientific certainty. On the other hand, it's not proof that the defendant is guilty by a mere preponderance of the weight of credible evidence.

. . .

Now having indicated to you what that term is not, we shall now approach the definition from the positive point of view. And I will tell you what reasonable doubt is. A reasonable doubt is a doubt which you conscientiously have at the use of your power of reasoning which arising [sic] out of the credible evidence or lack of credible evidence. It is a doubt for which you have a reason. And when you're convinced that you have no doubt in reason of the defendant's guilt then that is sufficient and you must render a verdict accordingly.

Transcript of Proceedings, at 1016-19 (emphasis added).

In particular, Petitioner contends that because of the underlined portions of the charge above – that a reasonable doubt "goes a good deal further" than a fleeting or

minimal doubt, and is "a good deal more than a mere possibility" – the jury was likely to apply those instructions in an unconstitutional manner.

DISCUSSION

I. Preservation of Federal Issue

Respondents first contend that Petitioner is barred from advancing his habeas claim because he failed to sufficiently object to the reasonable doubt charge at trial. While the parties acknowledge that Petitioner did object to the "good deal more"/"good deal further" phrases at side bar, Respondents assert that because counsel never articulated federal constitutional grounds to the trial court at that time, Petitioner failed to properly preserve that issue.

However, "[t]he Supreme Court has held that a procedural default does not bar consideration of a federal claim on habeas review unless the last state court rendering a judgment in the case "clearly and expressly" states that its judgment rests on a state procedural bar." *Tankleff v. Senkowski*, 135 F.3d 235, 247 (2d Cir. 1998) (quoting *Coleman v. Thompson*, 501 U.S. 722, 735, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991)). In *Tankleff*, the New York Appellate Division rejected the defendant's arguments by simply stating, "We have examined the defendant's remaining contentions and find them to be without merit." *People v. Tankleff*, 606 N.Y.S.2d 707, 711, 199 A.D.2d 550 (App.Div. 1993). Similarly, the New York Court of Appeals said only, "We have examined defendant's remaining contentions and find them to be either meritless or unpreserved." *People v. Tankleff*, 622 N.Y.S.2d 503, 505, 84

N.Y.2d 992, 646 N.E.2d 805 (1994). Because our Court of Appeals found it unclear whether the New York high court rejected the defendant's claim because it was unpreserved or because it was deemed meritless as a matter of federal constitutional law, it found that it could address the claim on habeas review. *See Tankleff*, 135 F.3d at 247.

This holding was reconfirmed in *Jones v. Stinson*, 229 F.3d 112 (2d Cir. 2000), where the Second Circuit recently stated that "[while] the [state] appellate division may have believed that [the defendant] was procedurally barred. . . . we follow the presumption established by the Supreme Court and ask not what we think the state court actually might have intended but whether the state court plainly stated its intention." *Id.* at 118. There, though the state appeals court set forth the factual predicate for finding a procedural default, "it never actually stated that the issue was not preserved." *Id.* Accordingly, our Court of Appeals held that the district court below correctly reached the merits of the habeas petition.

In this case, the N.Y. Appellate Division expressly reached the merits of Petitioner's claim, stating that "[c]ontrary to the defendant's contention, the reasonable doubt charge was proper." *People v. Santorelli*, 267 A.D.2d 259, *259, 699 N.Y.S.2d 291 (App. Div. 1999). The New York Court of Appeals, however, was unclear as to whether it addressed the claim on the merits, stating only that "[d]efendant's remaining contentions, to the extent preserved, are without merit." *People v. Santorelli*, 2000 WL 1599191, 2000 N.Y. Slip Op. 09151, at *15 (N.Y. 2000).

This Court finds the New York Court of Appeals ruling to be, at best, ambiguous as to whether it determined that Petitioner's federal constitutional claims concerning the jury instruction had been dismissed because they were unpreserved as a matter of state law or because they lacked merit. Absent a clear expression of that court's intent, the Court finds that it may address Petitioner's habeas claim. *See Jones,* 229 F.3d at 118-19 ("Because the appellate division . . . did not explicitly state its intention to rely upon an independent and adequate state ground, we conclude that the district court correctly reached the merits of the habeas petition."); *Tankleff,* 135 F.3d at 247; *Bolling v. Stinson,* 97 Civ 6721, 1999 U.S. Dist. LEXIS 6620, at *14 (E.D.N.Y. 1999) ("The Appellate Division's statement is too ambiguous to preclude federal review on the independent ground of procedural default.").

II. 28 U.S.C. § 2254(d)(1)

In order to prevail on his habeas Petition, Mr. Santorelli must satisfy the requirements of 28 U.S.C. § 2254 (d)(1). That statute reads:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States

28 U.S.C. § 2254(d)(1). As Petitioner concedes that the "contrary to" prong of § 2254(d)(1) is not applicable, he must show that Justice Cowhey's "reasonable doubt" charge was an "unreasonable application" of clearly established Supreme Court precedent.

A. Unreasonable Application

While the Supreme Court has not yet defined the exact contours of the reasonableness standard under § 2254(d)(1), it has clarified the standard in two ways. First, to determine whether an application of Supreme Court law is unreasonable, federal habeas courts must employ an objective standard. *See Williams v. Taylor*, 529 U.S. 362, ___, 120 S.Ct. 1495, 1521, 146 L.Ed.2d 389 (2000). "Rather than decide reasonableness by reference to the decisions of 'all reasonable jurists,' . . . federal courts 'should ask whether the state court's application of clearly established federal law was objectively [as opposed to subjectively] unreasonable.' " *Lurie v. Wittner*, 228 F.3d 113 (2d Cir. 2000) (quoting *Williams v. Taylor*, 529 U.S. at ___, 120 S.Ct. at 1521.

Second, an unreasonable application is more than a mere incorrect or erroneous application of federal law. *Williams v. Taylor*, 529 U.S. at ___, 120 S.Ct. at 1522-23. Recently, our Court of Appeals has stated that the increment of error need only be a small degree beyond being incorrect. *Francis v. Stone*, 221 F.3d 100, 111 (2d Cir. 2000) ("Some increment of incorrectness beyond error is required. We caution, however, that the increment need not be great; otherwise, habeas relief would be limited to state court decisions so far off the mark as to suggest

judicial incompetence.") (internal quotations omitted); *Lainfiesta v. Artuz*, 2000 WL 1459800 (S.D.N.Y. Sept. 29, 2000).

The Court is mindful that whether § 2254(d)(1) is triggered where there is an unreasonable refusal by a state court to extend Supreme Court precedents is an issue not yet conclusively resolved in this Circuit. *See Ramdass v. Angelone*, 530 U.S. ___, ___, 120 S.Ct. 2113, 2120, 147 L.Ed.2d 125 (2000) (plurality opinion of Kennedy, J., in which Rehnquist, C.J., and Scalia and Thomas, JJ. join) ("a state determination may be set aside under [AEDPA's] standard if, under clearly established federal law, the state court was unreasonable in refusing to extend the governing legal principle to a context in which the principle should have controlled."); *Lurie*, 228 F.3d at 129 ("we decline to decide . . . whether unreasonable refusals to extend Supreme Court precedents are sufficient to satisfy AEDPA's requirements of an "unreasonable application of" Supreme Court caselaw."). Because this Court finds that there was no unreasonable refusal to extend *or* apply Supreme Court precedent, that open question need not be decided here. Instead, for purposes of this opinion, the Court assumes *arguendo* that § 2254(d)(1) is triggered where there is an unreasonable refusal to extend federal law as clearly established by the Supreme Court.

B. Clearly Established Supreme Court Precedent

"Clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), refers to the "holdings, as opposed to the

dicta, of [the Supreme Court's] decisions as of the time of the relevant state-court decision." *Williams v. Taylor,* 529 U.S. at ___, 120 S.Ct. at 1522. Under § 2254(d)(1), "the source of clearly established law [is restricted] to [the Supreme Court's] jurisprudence." *Id.*

In reviewing jury instructions on habeas relief, the Supreme Court instructs that the federal court must inquire as to "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." *Estelle v. McGuire,* 502 U.S. 62, 72, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991). The instruction "may not be judged in artificial isolation, but must be considered in the context of the instructions as a whole and the trial record." *Id.*

Moreover, in *Sullivan v. Louisiana,* 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993), the Supreme Court held that if a jury instruction defining the reasonable doubt standard failed to meet constitutional muster, a harmless error analysis would not apply. Constitutionally deficient reasonable doubt charges are "structurally flawed," and strike at the very heart of the "trial mechanism." *Id.* at 281. Such deficiencies – if they can be demonstrated – are so fundamentally problematic that they should not be subjected to the further layer of a "harmless error" analysis. *Id.*

Petitioner cites *Cage v. Louisiana,* 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990), to challenge the trial court's instruction on "reasonable doubt." There, the Supreme Court – in a *per curiam* decision – found the charge to be constitutionally deficient because the trial court equated a reasonable doubt with a "grave uncertainty" and an

"actual substantial doubt," and stated that what was required was a "moral certainty" that the defendant was guilty. The Supreme Court held that the words "substantial" and "grave," as they are commonly understood, suggested a higher degree of doubt than is necessary under the reasonable doubt standard. *Id.*, at 329. Taken in combination with the reference to "moral certainty" – as opposed to evidentiary certainty – the court found that a reasonable juror could have interpreted the instruction to allow a finding of guilt below that which is required under the Due Process Clause, and reversed the conviction. *Id.* at 330.

C. Did Trial Court's Charge Violate § 2254(d)(1)?

As noted, Petitioner contends that the "good deal further"/"good deal more" formulations in Justice Cowhey's reasonable doubt charge was reasonably likely to instruct the jury to apply that standard in a way that violates the Constitution, and, accordingly, violated § 2254(d)(1). *See Estelle v. McGuire*, 502 U.S. at 72. Specifically, Petitioner argues that the words used in Justice Cowhey's charge – stating that reasonable doubt goes "a good deal further" than fleeting or minimal doubt, and that it "refers to a good deal more than a mere possibility" – was of the same nature objected to in *Cage* because they refer to an indefinite quantity and magnitude of doubt. By permitting the jury to determine his guilt based upon that standard, Petitioner contends that Justice Cowhey unreasonably applied and/or extended the holding in *Cage*, and violated Petitioner's clearly established constitutional rights.

Petitioner's reliance upon *Cage v. Louisiana* falls short. As an initial matter, Justice Cowhey's charge did not equate reasonable doubt with the phrases Petitioner objects to. Rather, both phrases were articulated as comparative terms, to be compared with capricious or unreasonable doubt. Accordingly, those phrases did not limit the definitional parameters of reasonable doubt as they did in *Cage*, nor did they define a higher quantum or degree of doubt than what is permitted under the Due Process Clause.

Second, nothing in Justice Cowhey's charge can be analogized to the term "moral certainty," which was the phrase in *Cage* that – in combination with "grave uncertainty" and "actual substantial doubt" – made it reasonably likely that a juror could have applied "reasonable doubt" in a way that violated the Constitution. *See Cage*, 498 U.S. at 41. Accordingly, it cannot be said that the state court's instruction on reasonable doubt misapplied the holding in *Cage* or unreasonably refused to extend that holding to Petitioner's case.

Moreover, while there may be some force to Petitioner's contentions that the objectionable language, considered in isolation, may have been somewhat imprecise, "not every unhelpful, unwise, or even erroneous formulation of the concept of reasonable doubt in a jury charge renders the instruction constitutionally deficient. The reviewing court must examine the charge as a whole, *see Cupp v. Naughten*, 414 U.S. 141, 146-47, 94 S.Ct. 396, 400-01, 38 L.Ed.2d 368 (1973), and assess 'whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet' the standard of proof beyond a reasonable

doubt." *Vargas v. Keane*, 86 F.3d 1273, 1276 (2d Cir. 1996) (quoting *Victor v. Nebraska*, 511 U.S. 1, 6, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994).

After review of the charge, the Court finds that the reasonable doubt instruction – viewing it as a whole – was not reasonably likely to instruct the jury to apply that standard in a way that violated the Constitution. *See Estelle v. McGuire*, 502 U.S. at 72. In later portions of the charge, the trial court instructed that a doubt founded in "reason" was "something that a reasonable person would recognize as making sense for that doubt," that a reasonable doubt could be based upon "the lack of evidence in the case," or "upon the testimony in [the] case," and was one "that seems to make sense." Transcript at 1017-18.

Moreover, the trial judge told the jury that he would approach the definition of reasonable doubt from both a negative and a positive point of view. From the "negative" point of view, he stated that reasonable doubt "does not refer to just any kind of a doubt, such as a mere whim, a guess, a surmise or even a feeling that the accused may not be guilty." Transcript at 1019. From the "positive" point of view, reasonable doubt was said to be "a doubt which you conscientiously have at the use of your power of reasoning which aris[es] out of the credible evidence or lack of evidence. It is a doubt for which you have a reason." Transcript at 1019.

The Court is satisfied that these later portions of the reasonable doubt charge – which were delivered immediately after the language objected to by the Petitioner – were sufficient to defeat Petitioner's claim that the objectionable language was reasonably likely to instruct the

jury to apply that standard in a way that violates the Constitution. *See Vargas,* 86 F.3d at 1276 ("an asserted error in a reasonable doubt instruction may be innocuous or inconsequential when viewed in the context of the charge as a whole"); *Chalmers v. Mitchell,* 73 F.3d 1262, 1267 ("Sometimes, erroneous portions of the jury instructions are offset when considered in the context or explained by the trial court in later sections of the instruction.").

"Courts have long recognized that the concept of "reasonable doubt" is not susceptible of easy definition." *Vargas,* 86 F.3d at 1280. While this Court recognizes that the concept can be described in different ways, Petitioner's challenge to the state trial court's instruction "arises on habeas review, and [this Court's] inquiry is whether the instruction is constitutional, not whether it is exemplary." *Id.*

CONCLUSION

For the foregoing reasons, the Petition is denied. The Clerk of the Court is directed to dismiss the Petition. In addition, the stay of the execution of the state judgment shall expire 30 days after the date of this Order. A Certificate of Appealability is granted.

SO ORDERED:

/s/ Barrington D. Parker
Barrington D. Parker, Jr.
U.S.D.J.

Dated: White Plains, New York
December 8, 2000

State of New York
Court of Appeals

---

2 **No. 104**

The People &c.,
Respondent,
v.
Anthony Santorelli,
Appellant.

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

Diarmuid White, for appellant.
Valerie A. Livingston, for respondent.

KAYE, CHIEF JUDGE:

In the early morning hours of February 4, 1994, Louis Balancio was murdered outside a bar where Anthony DiSimone and Darin Mazzarella had gathered with friends. At approximately 3:00 a.m. Darin Mazzarella called his brother, Nicholas, asking that he come to his apartment immediately. When Nicholas arrived at the apartment he found Darin, Anthony DiSimone and another mutual friend, Eric Tofty. DiSimone was wearing a sweater, jeans and a leather jacket. Tofty was dressed in a sweatsuit. DiSimone informed his friends that he "did an Albo," which Nicholas understood to mean that DiSimone had killed an individual of Albanian descent. As the men discussed what to do next, Alfred Santorelli, Darin's roommate, returned home and was told of the earlier events. Alfred told DiSimone and Tofty to change their clothes because they were covered in blood. The men went into the kitchen to change, and Alfred Santorelli emerged carrying two trash bags, one black and the other dark green, which he took from the apartment.

Later that day, while waiting in a restaurant parking lot to meet a fellow FBI agent, David Calore saw defendant – Alfred Santorelli's father – drive into the lot, exit his automobile, look around carefully and then discard a brown garbage bag in a nearby trash container. Intrigued by this behavior, Special Agent Calore continued observing defendant as he ate lunch in his car, placed the wrappings in a nearby receptacle, then again carefully looked around the parking lot and placed a second trash bag, this one black, in the same receptacle. Defendant made a call from a payphone and left.

Calore and his FBI friend then collected the trash bags and placed them in Calore's trunk. On later examination, Calore found a bloodstained leather jacket and sweater in the black bag and a sweatsuit, also stained with fresh blood, in the brown bag. Test results revealed that the blood and DNA found on the clothing were Balancio's. Additionally, defendant's fingerprints were found on the outside of both bags, and one of his fingerprints was found inside the brown bag.

Defendant was indicted on four counts of tampering with physical evidence. Before trial, the prosecutor informed him that the People would not call Darin Mazzarella to testify at trial. Consequently, defense counsel acknowledged that the People were not obligated to furnish *Rosario* material relating to Darin, and limited their inquiry to "*Brady/Vilardi* material" such as "any information emanating from [Darin] which is inconsistent with the People's theory of the case or is otherwise favorable to Mr. Santorelli." After receiving certain *Brady* material, defense counsel requested "in light of the federal-state nature of the investigation of Nicholas

Mazzarella * * * a copy of all FBI 302 [reports] and notes reflecting debriefings of Nicholas Mazzarella concerning persons and incidents related to this case." Defendant further sought "any other *Brady/Giglio* material in the People's custody or control or which, upon exercise of due diligence, can be brought within the People's custody and control."

The District Attorney promptly replied:

> "On February 23, 1998, I informed [defense counsel] that Assistant United States Attorney Kerry Lawrence of the Southern District of New York, indicated to me that he is attempting to locate the search warrant application done by Special Agent Calore on February 4, 1994. Since that time, Mr. Lawrence has advised me that he has learned that the application is sealed. The United States Attorney's Office is moving to unseal it so that I can provide it to you. As soon as he furnishes me with it, I will send it to you.
>
> "Further, in response to my inquiry, AUSA Lawrence and Agent Calore have informed me that no written reports were prepared regarding the anticipated [Nicholas] Mazzarella testimony in this matter concerning the Westchester County charges currently pending against your client. Both AUSA Lawrence and Agent Calore have declined to provide me with any reports concerning any debriefings of Nick Mazzarella regarding matters or individuals they have or are investigating."

Defendant subsequently attempted to subpoena the requested documents directly from the FBI. By letter dated February 27, 1998, the Department of Justice informed defense counsel that, on two grounds, the FBI

would resist the subpoena: first, defendant failed to follow proper procedures and second, the requested documents were protected by the federal Privacy Act and could not be released without "the written consent of the individual(s) involved or an appropriate court order." Defendant next moved to compel disclosure or, alternatively, to preclude Nicholas and Calore from testifying at trial. In a March 1998 letter to the court responding to defendant's motion, the Assistant District Attorney agreed to provide defendant with "all reports, notes and statements of [Nicholas] Mazzarella which this Office has in its possession or control." The prosecutor further informed the Trial Judge that:

> "as previously stated in my February 24, 1998 letter to defense counsel, Assistant United States Attorney Kerry Lawrence and FBI Special Agent David Calore previously have informed me that they have no written report[s] which contain statements by Nicholas Mazzarella concerning the events of February 4, 1994. AUSA Lawrence and Special Agent Calore, on March 6, 1998 and March 9, 1998 respectively, confirmed this representation and further stated that there also are no notes reflecting any such statements.
>
> "To the extent the defense is seeking reports and notes reflecting debriefings of Nicholas Mazzarella beyond the events of February 4, 1994, but concerning persons and incidents allegedly relating to this case, even the District Attorney's Office has been denied access by the federal government to such reports, assuming they exist. Contrary to the defendant's assertion, the FBI is *not* working 'hand-in-hand' with the

> Westchester County District Attorney in investigating and prosecuting this case. Rather, each agency is conducting its own separate but parallel, investigation.
>
> "The separate nature of these parallel proceedings is best demonstrated by the fact that: (1) the Westchester County District Attorney's Office neither was present nor participated in any debriefing of Nicholas Mazzarella unless it concerned the events of February 4, 1994; (2) members of the District Attorney's Office have not seen any of the additional documents the defense now seeks; and (3) after previously refusing disclosure, the U.S. Attorney's Office only agreed recently to provide the application and search warrant for the Mercedes auto operated by the defendant during the commission of this crime.
>
> * * *
>
> "[T]he federal government has denied access to the material the defense seeks, both by its oral refusal to the District Attorney's Office and its written responses to the defendant's subpoenas."

Shortly before trial, defense counsel argued to the Trial Judge that this was a joint State-Federal prosecution and defendant was therefore entitled to disclosure of the FBI 302 reports. The Judge inquired whether the District Attorney had turned over all *Brady* and *Rosario* material that was in the People's possession or control or could reasonably be obtained. Once again, the prosecutor assured the court that the People had disclosed everything within their reach, mentioning particularly the FBI reports pertaining to the events of February 4, 1994.

Noting that the parties had not "submitted any authority [establishing that the court had] permission or authority to subpoena the Federal Bureau of Investigation or any other Federal agency to produce documents," the Trial Court found that there was no evidence of joint efforts between Federal and State authorities with reference to this case, and that the People had satisfied disclosure requirements.

Both Calore and Nicholas Mazzarella testified at trial. Calore related his observations in the restaurant parking lot, and described his subsequent activities regarding the bloody clothing. Nicholas Mazzarella testified that on February 4, 1994, he saw Alfred Santorelli leave his apartment with two dark-colored trash bags. He also recounted his own extensive criminal background, including convictions for federal racketeering, witness intimidation, loansharking, armed robbery and his role in a conspiracy to murder an individual named Vincent Russell. Defense witnesses testified that in February 1994, defendant was in the process of moving out of his home and therefore had a lot of trash; that he felt the excess trash on his property was an eyesore; and that he would occasionally place garbage bags in his car and dispose of them in commercial refuse containers in the Bronx. In March 1998, a jury convicted defendant of all four counts of the indictment.

In October 1998, Alfred Santorelli – defendant's son – was tried on tampering with evidence charges stemming from the Balancio murder. Because Darin Mazzarella was a witness at Alfred Santorelli's trial, the People provided him with Darin's Grand Jury testimony, which included his recollection that the bags Alfred removed from the

apartment were white. Additionally, the People provided Alfred with two redacted FBI 302 reports they received in July 1998. The reports prepared by Agent Calore memorialized interviews with both Mazarella brothers pertaining to the Vincent Russell homicide. The reports indicated that after Nicholas strangled Russell, Darin cleaned up the murder site and dumped a garbage bag in the Bronx.

Defendant sought to have his conviction vacated pursuant to CPL 440.10, alleging that the People withheld material evidence in violation of *Brady v Maryland* (373 US 83) and *People v Rosario* (9 NY2d 286, *cert denied* 368 US 866). Supreme Court rejected defendant's argument that the People were obligated to produce the 302 reports relating to Nicholas and Darin Mazzarella which concerned another, unrelated homicide, observing that the reports were in the hands of the FBI, an agency not part of the New York State law enforcement chain. The Appellate Division affirmed the conviction and denial of the motion to vacate the judgment, as do we.

Discussion

Central to this appeal is the question whether FBI interview reports pertaining to a federal investigation were wrongfully withheld from defendant. Defendant urges that the People must be charged with the FBI's refusal to disclose the requested material, by preclusion of testimony or an adverse inference charge at trial, or by vacatur of the conviction on CPL 440.10 review. We disagree.

Prosecutors play a distinctive role in the search for truth in criminal cases. As public officers they are

charged not simply with seeking convictions but also with ensuring that justice is done. This role gives rise to special responsibilities – constitutional, statutory, ethical, personal – to safeguard the integrity of criminal proceedings and fairness in the criminal process.

In *Brady v Maryland* (*supra*, 373 US 83), for example, the United States Supreme Court held that due process requires prosecutors to disclose information in their possession or control that is both favorable and material to the defense (*see, People v Vilardi*, 76 NY2d 67, 73; *People v Scott*, 88 NY2d 888, 890). The requirement that the *Brady* material be in the People's possession or control, moreover, has not been interpreted narrowly. A prosecutor must "learn of any favorable evidence known to others acting on the government's behalf in the case" and promptly disclose any such material evidence to the defendant (*Kyles v Whitley*, 514 US 419, 437; *see also, Giglio v United States*, 405 US 150, 154 [applying agency principles]).

Thus, this Court has charged the People with knowledge of exculpatory information in the possession of the local police, notwithstanding the trial prosecutor's own lack of knowledge (*see, People v Wright*, 86 NY2d 591, 598; *see also, People v Novoa*, 70 NY2d 490, 498 [prosecutor was delinquent in failing to "discover and disclose" terms of cooperation agreement entered into between a trial witness and Special Prosecutor]). The duty to disclose information in these circumstances, of course, cannot be greater than the power to acquire it.

Here, defendant does not question that the People produced all *Brady* material in their actual possession.

Undisputedly, the People did not possess the additional reports defendant seeks. The reports – involving a separate, pre-existing investigation – were in the hands of the FBI, an independent federal law enforcement agency not subject to State control. While defendant argued that the two agencies were engaged in a joint or cooperative investigation, and that the District Attorney thus had constructive possession or control of the federal records, the Trial Court held otherwise, and the record before us supports that undisturbed finding (*contrast, United States v Antone*, 603 F2d 566, 569 [knowledge of State officers could be imputed to federal prosecutor where there was "extensive cooperation between the investigative agencies" and "entire effort was marked by [a] spirit of cooperation"]). Indeed, the record reflects that there were no undisclosed 302 reports concerning the February 4, 1994 events, and that federal reports concerning the FBI's "parallel" but separate investigation were unavailable to either side in this case.

Further establishing the District Attorney's lack of access to the FBI reports is the record of unsuccessful attempts to obtain them from federal authorities. On at least two occasions the District Attorney asked the United States Attorney's Office and the FBI for the reports, and both times was refused on the ground that the FBI considered the materials to be unrelated to the State's investigation. There is no record support for defendant's conclusory assertion of the People's bad faith or the existence of a government conspiracy to deprive defendant of information. That a federal law enforcement agent served as a fact witness at defendant's trial does not alter the conclusion that the People did not possess or

control – actually or constructively – the additional materials defendant sought.[1]

For much the same reason, we affirm the conclusion of the courts below that there was no *Rosario* violation.

CPL 240.45, which codified the rule established by this Court in *People v Rosario* (*supra*, 9 NY2d 286, 289), obligates the prosecution to disclose any recorded statement in its possession or control made by a person the prosecutor intends to call to the stand, which relates to the subject matter of the witness' testimony. Indeed, the "principal consideration for determining whether prosecutors have a fairness obligation under *Rosario* to turn over various materials focuses on whether these items actually are in or subject to the possession or control of the particular prosecution office" (*People v Kelly*, 88 NY2d 248, 252; *see also, People v Washington*, 86 NY2d 189, 191; *People v Flynn*, 79 NY2d 879, 882; Preiser, Practice Commentaries, McKinney's Cons Laws of NY, Book 11A, CPL 240.45, at 289).

As in the *Brady* context, the People cannot be charged with failure to disclose materials they themselves could not obtain from law enforcement officers answerable to

---

[1] We similarly reject defendant's contention that the Grand Jury testimony of nonwitness Darin Mazzarella constituted *Brady* material. Even if we were to consider this testimony "favorable," there is no reasonable possibility that conflicting testimony regarding the color of the trash bags used by defendant's son would have affected the outcome of this case (*see, People v Vilardi, supra*, 76 NY2d, at 77). Darin was examined about the discrepancy at the trial of defendant's son, who was nonetheless convicted of the same crimes as defendant; moreover, defendant's fingerprints implicated him in the crime.

another sovereign (*see, People v Kronberg*, 243 AD2d 132, 152 [no duty to turn over FBI 302 reports where "New York prosecutors were repeatedly rebuffed in their efforts to obtain the reports"]; *People v Leo*, 249 AD2d 251, 252 [no evidence of joint investigation and the People were not in control of federal file], *lv denied* 92 NY2d 900; *United States v Bermudez*, 526 F2d 89, 100 n9 [Jencks Act], *cert denied* 425 US 970; *contrast, People v Rutter*, 202 AD2d 123, 131 [prosecutor was "afforded unfettered access" to documents generated by out-of-state police investigation], *lv dismissed* 85 NY2d 866). *People v DaGata* (86 NY2d 40) – concerned with the disclosure requirements of CPL 240.20(1)(c) – does not compel a different result. In *DaGata*, defendant sought notes the FBI used in preparing a scientific report for the District Attorney. Significantly, "no reason whatsoever" was given for the People's failure to disclose them (*id.*, at 44).

Finally, we conclude that defendant waived his *Antommarchi* right to be present at a sidebar discussion during jury selection. The parties disputed the timing and content of an untranscribed discussion, and the Trial Judge accepted their submissions in an effort to settle the record. Defendant argued that prospective jurors were questioned in his absence and that defense counsel improperly purported to waive his *Antommarchi* right outside his presence. The Trial Judge, however, found otherwise. Based on what he described as his "very vivid recollection" of the events, and on his notes, the Trial Judge concluded:

> "For reasons inexplicable to this court, there was colloquy which I do not see in the transcript immediately following page 134 at line 10. This

> court does recall that when the attorneys assembled at side bar, this court made comment to the effect that at least two, and maybe four, prospective jurors made statements which might give rise to challenge for cause. Attorneys were asked to discuss the matter between themselves and see if there was any consent that could be agreed upon concerning at least two, if not all four, of the prospective jurors. [The prosecutor], at this point, expressed concern concerning *Antommarchi* principles and the absence of defendant at side bar since defendant was still seated at defense counsel table. [Defense counsel] turned to defense counsel table and in brief words inquired if defendant wished to be at sidebar whereupon defendant indicated that his answer was 'no,' accompanied by shaking of his head sideways and moving his hand in a horizontal line gesture, all of which was interpreted as being an answer in the negative.
>
> * * *
>
> "The court's *very definite recollection* is to the effect that the court reporter was seated, with machine, right there at side bar during this occurrence. In this court's opinion and to the best of my knowledge and belief, the *Antommarchi* waiver was received and recorded" (Decision and Order dated Oct. 30, 1998, at 4-5 [emphasis added]).

The Judge further denied defendant's request for a reconstruction hearing, concluding that such a proceeding would be unnecessary because "the papers and record submitted, together with the court's clear recollection, are adequate for the court to reconstruct and recall what occurred" (*id.*, at 6).

Defendant argues that the court abused its discretion in denying a reconstruction hearing. We disagree. Trial Judges – responsible for "laboring to elucidate what originally took place before them" – are charged with "passing upon the accuracy of * * * proceedings before them" (*People v Alomar*, 93 NY2d 239, 245, 247; *see also*, CPLR 5525[c][1]). Not *every* dispute about the record mandates a reconstruction hearing. Here, the Trial Judge considered, and rejected, defense counsel's recollection of what transpired at the sidebar.[2] The Judge – "final arbiter of the record" (*People v Alomar, supra*, 93 NY2d, at 247) – had a very vivid recollection of the disputed proceeding, and under the circumstances, determined a reconstruction hearing was unnecessary.

Moreover, as reconstructed by the Trial Judge, the record establishes that defendant waived his right to be present at sidebar. We agree with the dissent that this situation is "distinctly different" from the one presented in *People v Keen* (94 NY2d 533, 536) – it is even more compelling. In *Keen*, the Trial Judge asked defense counsel, not defendant, whether his client would waive the right to be present at the sidebar questioning of prospective jurors, and defense counsel responded in the affirmative. Here, the Trial Judge found that counsel asked

---

[2] The Trial Judge explicitly rejected the statement of one of defendant's lawyers that he erroneously believed he alone could waive *Antommarchi*, without consulting with his client (dissent, at 2). The Trial Judge rejected this statement "as not being in accord with [his] recollection of words and circumstances existing throughout the trial, as exhibited by this highly skilled, most learned and knowledgeable counsel" (Decision and Order dated Oct. 30, 1998, at 2).

defendant, who was seated at counsel table, whether he wished to be present at the sidebar discussion, and defendant indicated that he did not.

Defendant's remaining contentions, to the extent preserved, are without merit.

Accordingly, the orders of the Appellate Division should be affirmed.

SMITH, J. (dissenting)

I agree with the majority that there was no *Rosario* or *Brady* violation in this case. Nevertheless, I believe that *People v Antommarchi*, 80 NY2d 247 (1992) was violated.

The Trial Judge settled a record in which he indicated that the defendant had waived his *Antommarchi* rights. The Judge stated that while the prosecutor and the defense attorney were at the bench discussing the qualification of a juror to sit in the case, the prosecutor raised the *Antommarchi* issue. At that time, the defense attorney reportedly turned to defendant and asked him if he wanted to be present. Defendant reportedly shook his head and waved no. This is not a valid *Antommarchi* waiver. This is distinctly different from the situation in *People v Keen* (252 AD2d 278, 281, *aff'd* 94 NY2d 533), in which the trial judge asked the defendant, on the record, if he waived his *Antommarchi* rights and this Court ruled that there was a valid *Antommarchi* waiver.

Moreover, this is not a case in which the prosecutor and the defense attorney disputed something in the

record and the judge resolved the dispute by settling the record. Rather, this is a case where the court reporter's notes do not indicate anything about an *Antommarchi* waiver. In addition, the defense attorney specifically stated that this incident, as recalled by the Judge, did not take place while the prosecutor indicated that it did take place.

It should also be noted that both the defense attorney and the defendant state under oath that the defense attorney never informed the defendant about his *Antommarchi* rights. The defense attorney states that although he knew that the defendant had the right to be present when questions were put to prospective jurors concerning their ability to be fair, he was of the opinion that the right could be waived by the attorney alone and he waived that right without consultation with the defendant.

In light of the differing factual allegations, there should have been a hearing as to what the facts were.

Accordingly, I dissent.

****

Orders affirmed. Opinion by Chief Judge Kaye. Judges Levine, Ciparick, Wesley and Rosenblatt concur. Judge Smith dissents in an opinion.

Decided October 26, 2000

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND
JUDICIAL DEPARTMENT

_____AD2d_____ Argued –
FRED T. SANTUCCI, J.P. November 8, 1999
DANIEL W. JOY
ANITA R. FLORIO
DANIEL F. LUCIANO, JJ.

1998-05004

DECISION & ORDER

The People, etc.,
respondent,
v Anthony Santorelli,
appellant.
(Ind. No. 96-01596)

Diarmuid White and Brendan White, New York, N.Y. and Gerald B. Lefcourt, New York. N.Y., for appellant (one brief filed).

Jeanine Pirro. District Attorney, White Plains, N.Y. (Valerie A. Livingston and Richard E. Weill of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Westchester County (Cowhey, J.), rendered June 1, 1998, convicting him of tampering with physical evidence (four counts), upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed, and the matter is remitted to the Supreme Court, Westchester County, for further proceedings pursuant to CPL 460.50(5).

Contrary to the defendant's contention, the reasonable doubt charge was proper (*see, People v Messiah*, 247 AD2d 490).

The defendant's remaining contentions are without merit.

SANTUCCI, J.P., JOY, FLORIO, and LUCIANO, JJ., concur.

ENTER:

James Edward Pelzer
Clerk

December 6, 1999

[1016] SUPREME COURT OF THE STATE OF NEW YORK, WESTCHESTER COUNTY

COURT'S CHARGE ON REASONABLE DOUBT AND EXCEPTION THERETO

I am now going to discuss with you and define for you the term "proof beyond a reasonable doubt." You people as the triers of the fact in this matter do not have to be absolutely positive that the defendant is guilty. You do not have to believe that he is guilty to such a degree that there can be no possibility of doubt about it. The law does not require that because nothing in this life is so absolutely certain that it can be proven that completely; but you do, if you're going to convict the defendant after being satisfied of [1017] his guilt in a way that leaves you without any reasonable doubt of it. Those words "reasonable doubt" means nothing more or less than the two simple words themselves mean.

You know perfectly well what is doubt. It's something that makes you unsure or uncertain. If your doubt is simply of the fleeting or the minimal type, it's not a basis for avoiding the conclusion or for avoiding the determination of the facts in this matter. A reasonable doubt goes a good deal further. A reasonable doubt is an uncertainty for which you have what appears important to be a reason based upon the evidence in the case or lack of evidence in the case. It refers to a good deal more than a mere possibility. If such reasonable doubt remains after all of the proof has been given, then the People have not established guilt under our law. If you do not have a reason – something that a reasonable person would recognize as making sense for that doubt, you should disregard that doubt if you have been otherwise convinced of

guilt. But if you have a reasonable doubt, one based upon the testimony in the case, one that [1018] seems to make sense, not just some kind of a mere whim or impulsive idea or some kind of an emotional and gut reaction, because that would not be a reasonable doubt; or if you have a reason based upon the lack of evidence in the case, on one of the essential elements of the crime charged and thereby they are being considered by you, then you have come up with a a [sic] reasoning for voting not guilty.

Now in order to understand this term "proof beyond a reasonable doubt," I am going to approach its definition both from the positive as well as from the negative point of view.

Firstly, from the negative point of view I will tell you what that term is not. That term does not refer to just any kind of a doubt, such as a mere whim, a guess, a surmise or even a feeling that the accused may not be guilty. Again, the human mind can conceive of doubt on virtually any topic. It is not a requirement of proof beyond all doubt. It is not a requirement of proof to some kind of a mathematical or scientific certainty. On the other hand, it's not proof that the defendant is guilty by a mere [1019] preponderance of the weight of credible evidence.

As some of you people have sat in a civil case will recall the rule to be applied in a civil case is proof of the defendant's guilt be a mere preponderance of the weight of the credible evidence is not sufficient to prove the defendant guilty in this or any other criminal case; and, of course, the rule is not one that is to be used by any juror as an excuse or a mechanism to avoiding from

performing what the or she might consider to be a difficult or disagreeable duty.

Now having indicated to you what that term is not, we shall not approach the definition from the positive point of view. And I will tell you what a reasonable doubt is. A reasonable doubt is a doubt which you conscientiously have at the use of your power of reasoning which arising out of the credible evidence or the lack of credible evidence. It is a doubt for which you have a reason. And when you're convinced that you have no doubt in reason of the defendant's guilt then that is [1020] sufficient and you must render a verdict any [sic] accordingly.

Each of you are to fully, fairly, and is [sic] conscientiously consider and weigh all of the evidence. Using the same power of reasoning and the same power of decision-making that you would apply and do apply to weighing important matters in your own personnel and business affairs. If you then believe that each material element of the particular crime submitted to you then and there being considered has been established according to the standards we are now setting forth, then you must find the defendant guilty of that crime beyond a reasonable doubt. On the other hand, if you have such a reasonable doubt arising out of the credible evidence or lack of it as to any essential element of the particular crime then and there being considered by you, then the benefit of that doubt must be given to the defendant and your verdict then must be one of not guilty.

If there is a reasonable doubt upon any material question necessary for conviction, it must be resolved in defendant's favor. In [1021] arriving at your verdict while

you should discuss and consider the opinions of other jurors, each of you must decide this case upon your own opinion and your own judgment of the evidence.

* * *

[1064] MR. WHITE: Your Honor, I except to the portion of your reasonable doubt charge in which on two occasions you used the phase [sic] "a good deal further." You said what a reasonable doubt is not, "to go a good deal further than beyond a possibility." Yes, your Honor, we except to the use of this terminology "a good deal further." You used it once prior to that, a good deal more than a mere possibility, it goes a good deal further. I don't know what the terminology was, your Honor. We think it did loosely –

[1065] THE COURT: I think it states it. This charge on reasonable doubt has passed muster of the court of appeals on many occasions.

MR. WHITE: I'm wondering if anybody has raised this one before, your Honor. We except to that in any event.

* * *